

RECENT UPDATE IN GEORGIA PRODUCTS LIABILITY LAW

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I. DUTY TO WARN

A. Foreseeability and The Duty to Warn

Recently, both the federal and state courts in Georgia have been faced with the issue of foreseeability of harm in products liability actions. In Smith v. Ontario Sewing Machine Co., Ltd., 249 Ga. App. 364, 548 S.E.2d 89 (2001), the court elaborated upon a manufacturer's post-sale duty to warn. In that case, plaintiff-appellant, a worker in a sewing machine plant, sued the defendant-appellee manufacturer for injuries sustained on the job. Defendant had sent post-sale notices to plaintiff's employer warning the employer to stop using the machines, but did not specify the particular defects. Plaintiff never learned of these notices. More importantly, employees of the manufacturer, Ontario Sewing Machine Co., had visited the particular plant site and saw workers using the defective machines, but never attempted to speak to the workers. Moreover, the employees of the defendant never attached signs to the machines, mailed or distributed warnings or attempted any other methods to warn of the dangers.

The Georgia Court of Appeals emphasized that there is a post-sale duty to warn, even for successors of manufacturers, relying on the Restatement (Third) of Torts. In

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this case, the manufacturer of the defective mechanism owed such a duty to warn. More importantly, the Court held that Ontario had a duty to recall the defective product, stating as follows:

When the manufacturer subsequently learns that its products have been sold with dangerous defects, it is under a duty to recall the product from the market and to remedy the defect or replace the product in some cases in the exercise of ordinary care beyond the duty to give a post-sale warning.

249 Ga. App. at 368. Furthermore, in finding that defendant's actions with regard to the recall were completely inadequate, the Court noted as follows:

A post-sale warning must be adequate and specific to satisfy the manufacturer-seller's duty to the ultimate user to protect from harm; a vague or generalized warning that fails to warn of the specific defect, the danger from the defect, and remediation is not an adequate warning (emphasis added).

Id. at 369. Because Ontario "sought refuge" behind their vague attempt at a recall notice, the court held that it, as a manufacturer, could not shift the burden to recall and warn to the employer.

Of import with regard to the Smith case are two things. Although the court did not specifically base its ruling on the doctrine of foreseeability, it is clear that in imposing such a high burden on the manufacturer, foreseeability was a factor. More importantly, however, the Supreme Court of Georgia recently granted certiorari to reconsider whether the Court of Appeals erroneously expanded the law regarding the scope of duties of manufacturers and sellers with respect to product defects. Oral argument is presently set for May of 2002.

In DeLoach v. Rovema Corp., 241 Ga. App. 802, 527 S.E.2d 882 (2000), plaintiff-appellant was injured while performing maintenance on a tea bagging machine at work. The issue presented to the Court of Appeals was whether the seller had a duty to warn of dangers that became known after the sale to plaintiff's employer. In affirming summary judgment for the defendant, the Court held there was no duty to warn. The duty of the seller to warn was "only of dangers actually or constructively known at the time of sale." 241 Ga. App. at 804. Thus, depending on the outcome of the Smith case, the duty to warn is clearly broader for manufacturers than it is for sellers.

The issue of foreseeability in regard to the duty to warn recently arose in Williams v. Web Packaging Corp., 2002 U.S. Dist. Lexis 4103 (M.D. Ga. March 2002). In that case, the Middle District of Georgia was faced with issues of foreseeability regarding product alteration. Williams was a products liability case tried to a jury who returned a verdict for the defendant. Plaintiff-appellant filed a Motion For New Trial alleging that the Court committed numerous errors, including failure to instruct the jury properly with respect to the issue of alteration as to the design defect claim. Plaintiff sought a charge to the effect that defendant had offered evidence that the subject palletizer machine which injured plaintiff was altered from its original condition after it was sold by defendant. Defendant contended that the alterations constituted intervening acts absolving it from liability. Plaintiff wanted the judge to charge the jury that such an intervening act would absolve the defendant only if alteration "was not foreseeable by the defendant. . ." Id. at 2. Instead, the Court instructed the jury as follows:

The plaintiff cannot recover if his injuries are not traceable to the original design of the defendant. And an injury is not traceable to the original

design of the defendant if the machine was materially altered and if the alteration was sufficient of itself to cause injury.

Id. at 3. Plaintiff contended that instruction was erroneous because it omitted the concept of foreseeability.

The Court agreed with plaintiff “because Georgia law recognizes that the concept of foreseeability is relevant to a design defect claim,” Id. at 5, citing numerous important decisions in this respect, to wit, Chrysler Corp. v. Batten, 264 Ga. 723, 450 S.E.2d 208 (1994); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984); and Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994). The Court further reiterated, however, relying upon Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981), that a manufacturer has the right in strict liability cases to be “adjudged on the basis of the design of its own marketed product and not that of someone else.” Id. at 7. Recognizing the conflict between the law in Georgia, the Court held that in the instant case, the Court’s instruction on the issue of alteration did not misstate the law. Rather, the Court’s instruction was incomplete because it did not instruct the jury with regard to foreseeability of the alteration made. Id. As such, “the Court should have instructed the jury that defendant could be liable if the alteration was foreseeable, but that defendant could not be liable if the alteration was substantial (and therefore unforeseeable as a matter of law).” Id. at 9. Unfortunately, since a general verdict form was used, the Middle District found there was no way of knowing the basis of the jury’s verdict. Not knowing the jury’s rationale, the Court found that plaintiff was entitled to a new trial. In dicta, the Middle District also noted that uncertainties in the law would make the case an ideal candidate for certification to the Georgia Supreme

Court, but federal district courts cannot certify questions of the Georgia Supreme Court, and therefore, a new trial must stand.

B. Learned Intermediary Doctrine

The learned intermediary doctrine, sometimes referred to as the “sophisticated user” doctrine, generally holds that where a product is sold to a particular group or profession, there is no duty to warn of risks generally known to that group or profession. See, e.g., Exxon Corp. v. Jones, 209 Ga. App. 373, 433 S.E.2d 350 (1993). Based upon issues of foreseeability, the rationale behind this doctrine is that a duty to warn depends not just upon foreseeability of the use of the product in question, but also the user’s knowledge. Wilson Foods Corp. v. Turner, 218 Ga. App. 74, 460 S.E.2d 532 (1995).

This concept was recently addressed in the medical arena in Toole v. Baxter Healthcare Corp., 235 F.3d 1307 (11th Cir. 2000). In that case, plaintiff-appellant Toole, a breast implant recipient, sued the successor corporation of the manufacturer of the implants. She was awarded a great amount in damages, and the trial court granted the defendant-appellee’s JNOV on punitives and reduced the general damage award to \$1 million. In specifically addressing the duty to warn, the Eleventh Circuit stated that “it is limited to an obligation to advise the prescribing physicians of any potential dangers that may result from the use of its product.” Id. at 1313. Thus, any duty to warn with regard to the breast implants themselves did not extend all the way to the ultimate user, in that case, the patient. In sum, based on this doctrine, combined with the concept of foreseeability, the physician has the sole responsibility to advise his patient of any potential dangers associated with a product. See also, McCombs v. Synthes, 250 Ga. App. 543, 553 S.E.2d 17 (2001).

II. EXPERT WITNESSES AND THE DAUBERT STANDARD

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993), the United States Supreme Court rejected the traditional notions governing the admissibility of expert opinions. Based on Federal Rule of Evidence 702, an expert can testify if three requirements are met. First, the individual must be competent and qualified on the very issues before the court. Secondly, the expert's methodology must be sufficiently reliable. Finally, the expert, through scientific, technical, or specialized expertise, must provide testimony that assists the trier of fact to understand the evidence before it. In determining whether these three requirements are met, the trial judge, in federal actions, becomes the "gatekeeper," determining whether the expert evidence lives up to the reliability and relevance standards.

The Toole case, *supra*, also addressed the defendant's allegation that expert testimony was improperly admitted on behalf of the plaintiff with regard to causation. Reiterating the standard set forth in Daubert, the Eleventh Circuit dismissed defendant's arguments, recognizing that the trial court has extremely broad discretion in its gatekeeper function. In the more recent case of Siharath v. Sandoz Pharmaceuticals Corp., 131 F. Supp.2d 1347 (N.D. Ga. 2001), the Northern District of Georgia was called upon to address the concept of "junk science." In those combined cases brought by two plaintiffs who suffered strokes after taking a drug manufactured by the defendant, the District Court accepted the defendant's argument regarding excluding plaintiffs' expert witness on causation. The District Court found that the lack of scientific methodology, including the non-existence of any epidemiological studies, precluded the

admission of such testimony. The Court did not question the expert's competency, but found that the second prong required under Daubert was lacking. Specifically, the rate of error of the studies was unknown, and there was very limited peer review. In so holding, the Court stated that "in an attempt to prohibit the presentation of 'junk science' to the trier of fact, perhaps Daubert has raised the bar of admissibility of expert testimony too high. It is not, however, for this Court to seek the middle ground." Id. at 1373.

Obviously, while the trial judge does have broad discretion in determining whether to allow expert testimony, that discretion is not without limits. The three requirements of Daubert must be met. Finally, these requirements, of course, only apply in federal courts since they are based on the Federal Rules of Evidence.

III. THE STATUTE OF REPOSE

O.C.G.A. § 51-1-11(b)(2) provides as follows:

No action shall be commenced pursuant to this subsection with respect to an injury after 10 years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.

Thus, in strict liability actions, plaintiff cannot maintain a strict liability claim for any reason as a matter of law if the product sued upon was manufactured more than 10 years from the date of the first sale for use or consumption.

Subsection (c) of that statute, which has been the basis of many suits in the past, contains two exceptions in causes of action based on negligence. The first is the exclusion in subparagraph (c) which states that with regard to negligence claims, "nothing contained in this subsection shall relieve a manufacturer from the duty to warn

of a danger arising from the use of a product once that danger becomes known to the manufacturer.” The second exception is for claims arising out of defendant’s conduct which constitutes “a willful, reckless, or wanton disregard for life or property.”

In Dorsey Trailers, Inc. v. Knight, 2001 Ga. App. Lexis 123 (Feb. 2001), the Georgia Court of Appeals expanded upon the application of the 10-year statute of repose with regard to when time actually begins to run. That case involved the malfunction of an aerial lift commonly referred to as a “cherry picker” manufactured by defendant Dorsey. Plaintiffs contended that the trial court improperly determined the date upon which the statute of repose began to run, thereby eliminating all of their claims for failure to warn. Applying Georgia law, the Court affirmed the trial court’s finding that the clock began to tick from the date that the first purchaser, and not one of the defendants, acquired the lift. In other words, § 51-1-11(b)(2) does not provide that the period of repose commences on the date of the “first sale” of a product by its manufacturer, but that it commences on the date of the first sale for use or consumption. Thus, in effect, Dorsey expanded the window of responsibility for defendants.

In Vickery v. Waste Management of Georgia, Inc., 249 Ga. App. 659, 549 S.E.2d 482 (2001), the court reiterated that in a failure to warn product liability action, to escape the 10-year time bar, there must be evidence of willfulness. In that case, the failure to install backup warning signals in a truck did not constitute such a wanton disregard for life to trigger the exception of the 10-year statute of repose. Affirming that “willful

conduct is based on an actual intent to cause harm or injury,” there simply was no evidence of that. 249 Ga. App. at 660.

IV. DEFENSES IN PRODUCT LIABILITY ACTIONS

In Dean v. Toyota Ind. Equip. Manfrg., Inc., 246 Ga. App. 255, 540 S.E.2d 233 (2000), one of the issues before the court was the doctrine of assumption of the risk. In that case, Toyota was granted summary judgment in plaintiff’s suit alleging strict liability for failure to install a back-up alarm on its forklift. Toyota argued that plaintiff knew the forklift had no backup alarms, knew they were dangerous, and had been warned of that fact. On the other hand, plaintiff contended he did not know the forklift was near him at the time or even operating in the general area. In agreeing with plaintiff, the court found that whether a party assumes the risk of injury is a jury question that should not be decided by summary judgment “unless the defense is conclusively established by plain, palpable, and undisputed evidence.” 246 Ga. App. at 258. As a matter of law, it could not be stated that plaintiff voluntarily exposed himself to a known risk and deliberately chose a perilous course of conduct. Therefore, it was a jury question.

In addressing the applicability of defenses in strict liability actions, the courts must utilize the “risk-utility analysis” enunciated in the Banks decision, supra. Prior to that case, if a danger was known, open, and obvious to the plaintiff, then a design defect action could not be brought. Since Banks, an open and obvious defense may still apply, but it becomes one of the many factors to be injected into the analysis. For example, in Cornish v. Byrd Welding Service, Inc., 252 Ga. App. 793, 557 S.E.2d 432 (2001), plaintiff-appellant-employee sued the defendant-appellee-manufacturer when he

slipped and fell on metal stairs manufactured and installed at his place of employment. Cornish alleged that the stairs were defectively designed and manufactured. The case went to trial, and the jury returned a verdict for the defendant. On appeal, plaintiff alleged that the trial court's charge that it could consider the open and obvious danger of the product as an additional factor pertinent to its risk-utility analysis was erroneous, and that it improperly shifted the burden of proof to plaintiff.

The Court of Appeals affirmed the defense verdict, finding as follows:

Cornish correctly points out that the pattern risk-utility jury charge does not explicitly set out the open and obvious nature of the danger of a product as a risk-utility factor. [cit. Omitted] However, it does not follow that a charge explicitly doing so impermissibly shifts the burden of proof to the plaintiff as Cornish urges it does. An instruction authorizing a jury to consider open and obvious danger in a product as one among many risk-utility factors in a design defect case, as here, is not the functional equivalent of an instruction as to the open and obvious danger rule, a rule no longer proper in design defect cases "whether brought in strict liability or in negligence." [cits. Omitted]

252 Ga. App. at 794. In other words, while assumption of the risk remains a valid defense in product liability actions, the "open and obvious" defense becomes a risk-utility factor and not a complete bar to recovery. This is an important distinction, especially in cases addressing allegations of failure to warn, inasmuch as there is no duty on a manufacturer to warn of a product danger that is obviously and generally known. Moore v. ECI Management, 246 Ga. App. 601, 542 S.E.2d 115 (2000). However, as noted in that case, an open and obvious defense in a design defect case is more difficult to argue.

V. MISCELLANEOUS

A. Evidentiary Issues

In Cooper Tire & Rubber Co. v. Crosby, 273 Ga. 454, 543 S.E.2d 21 (2001), plaintiff-appellee sued defendant-appellant tire manufacturer after she and her daughter were injured and her husband was killed. She claimed that the blowout leading to the accident was caused by a defective tire. The trial court excluded plaintiff's "adjustment data," which was statistical evidence of consumer claims of defective tires that defendant had previously honored. After a defense verdict, the Court of Appeals reversed, ruling that the exclusion of that evidence was error. The Georgia Supreme Court granted Defendant's Petition For Certiorari and reversed the Court of Appeals, holding that the trial court correctly ruled such data inadmissible. "Without an independent showing of a substantial similarity between the purported tire defect that caused the injuries in this case and the basis for the consumer claims that were honored by the manufacturer", the evidence was not allowed. 273 Ga. at 454. In so finding, the Georgia Supreme Court stated as follows:

In products liability cases, the "rule of substantial similarity" prohibits the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows that there is a "substantial similarity" between the other transactions, occurrences, or claims and the claim at issue in the litigation. The showing of substantial similarities must include a showing of similarity as to causation. Before admitting proffered evidence of other transactions in products liability cases, the trial court must satisfy itself that the rule of substantial similarity has been met.

Id. at 455. Thus, Crosby's attempt to introduce nine years worth of adjustment data concerning all tires manufactured by Cooper lacked evidence that they were the same

make and model as the tire at issue. Moreover, plaintiff failed to show that the tires in those studies suffered from the same defect as alleged in her suit.

B. What Constitutes “Product Use”

In Jones v. Nordictrack, Inc., 268 F.3d 1292 (11th Cir. 2001), the Eleventh Circuit certified the following question to the Georgia Supreme Court: “Must a product be in use at the time of injury for a defendant to be held liable for defective design under theories of strict liability, negligence, or failure to warn?” 268 F.3d at 1292. In responding, the Georgia Supreme Court found that the focus is not on use of the product, but rather the balance of risks inherent in a product design against its utility. Thus, the Supreme Court made clear “that product ‘use’ is not a necessary predicate to liability in design defect cases. . .” Id. In so holding, the Court further explained that the appropriate analysis to be utilized is in accordance with Banks. Accordingly, when the district judge focused on whether the plaintiff was using the product, he failed to properly apply the risk utility analysis, and as such, the grant of summary judgment in favor of Nordictrack was reversed and remanded.